84-278

Office-Supreme Court, U.S.
FILED
AUG 17 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY, Appellant,

v.

WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION, Appellee.

On Appeal From The Supreme Court of Wyoming

JURISDICTIONAL STATEMENT

August, 1984

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65 pp

Clyde F. Stagner, the appellant, appeals from the final judgment of the Supreme Court of Wyoming, dated May 22, 1984, which holds Section 39-6-106, Wyoming Statutes 1977, valid against appellant's contentions that the statute, on its face and as applied to him, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and the United States Treaty With the Eastern Band Shoshoni and Bannock and federal preemption principles.

QUESTIONS PRESENTED

(1) Whether §39-6-106, W.S. 1977, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in that the statute authorizes state seizure and confiscation of private property, specifically cigarettes, with no provision by state statute, agency regulation or any law whatsoever for any form of notice or hearing to be afforded the owner of the seized cigarettes.

(2) Whether §39-6-106, W.S. 1977, as applied to an Indian cigarette dealer on the Reservation, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in that the statute authorizes state seizure and confiscation of cigarettes for nonpayment of cigarette taxes despite the fact that no statute or agency regulation informs Indian dealers of if, when and how they have an obligation to collect the cigarette tax.

(3) Whether §39-6-106, W.S. 1977, as applied to an Indian cigarette dealer on the Reservation, violates the United States Treaty With the Eastern Band Shoshoni and Bannock and federal preemption principles in that the statute disadvantages appellant because of his special status as a federally licensed Indian trader on the Reservation who concededly need not possess a state cigarette license.

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OPINIONS BELOW

The opinion of the Supreme Court of Wyoming, which appears in the appendix hereto, p.1a, *infra,* is reported at 682 P.2d 326 (1984).

The opinion of the District Court of the First Judicial District of the State of Wyoming, which appears in the appendix hereto, p.18a, *infra,* was delivered in the form of a letter and was not reported.

No written findings or opinion were issued by the Wyoming State Tax Commission and State Board of Equalization.

Appellant previously initiated legal action between these same parties in the District Court of the Ninth Judicial District of the State of Wyoming concerning cigarettes seized enroute to him on March 5, 1981. The District Court's Order of Dismissal in that case, dated October 24, 1981, which appears in the appendix hereto, p.32a, *infra,* was not reported. Appellant appealed the Order of Dismissal to the Supreme Court of Wyoming; that Court affirmed the dismissal in a decision dated April 6, 1982, which is reported at 642 P.2d 1296 (1982) and appears in the appendix hereto, p.28a, *infra.*

JURISDICTION

In this case, the highest court of the State of Wyoming upheld the validity of §39-6-106, W.S. 1977, against appellant's contention that said statute is repugnant to the Constitution of the United States, the United States Treaty With the Eastern Band Shoshoni and Bannock and federal preemption principles.

The decision of the Supreme Court of Wyoming was entered on May 22, 1984. See p.1a, *infra.* Appellant did not request a rehearing.

The notice of appeal was duly filed on July 3, 1984, in the Supreme Court of Wyoming. See p.34a, *infra.* A copy of the notice of appeal was filed on July 2, 1984, in the District Court of the First Judicial District of the State of Wyoming, the court possessed of the record.

The jurisdiction of this Court to hear this appeal rests upon 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISION, TREATY AND STATE STATUTE INVOLVED

Fourteenth Amendment, United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

The United States Treaty With the Eastern Band Shoshoni and Bannock, 15 Stat., 673 (1868) is set forth in the appendix hereto, p.38a, *infra.*

The Wyoming cigarette tax statutes are set forth in Wyoming Statutes, Sections 39-6-101 through 39-6-110, 1977. Section 39-6-106 declares:

> (a) Any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by this article are contraband goods and may be seized without a warrant by the board or any peace officer of this state when so directed by the board. This section does not apply to cigarettes in the original unopened shipping package in the possession of or in transit to a licensed wholesaler or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article.
>
> (b) Cigarettes seized in accordance with subsection (a) of this section shall be sold by the board to a licensed wholesaler to the best advantage of the state. Proceeds from the sale shall be remitted to the state treasurer for deposit into the general fund. The licensed wholesaler purchasing the cigarettes shall pay taxes and affix stamps, imprints or impressions as provided by this article on cigarettes so purchased. (Laws 1951, ch. 152, §10; W.S. 1957, §39-169; Laws 1977, ch. 51 §1.)

STATEMENT OF THE CASE

Appellant Clyde F. Stagner is an enrolled member of the Shoshone Tribe of Indians of the Wind River Indian Reservation. He resides on the Reservation and owns and operates the West Route Trading Company which is located on Reservation land held in trust by the United States Department of the Interior, Bureau of Indian Affairs, and leased to Mr. Stagner.

Appellant holds a Trader's License issued to him by the United States Department of the Interior, Bureau of Indian Affairs, to conduct business on the Wind River Indian Reservation. Mr Stagner does not have a Wyoming cigarette sales license.

Cigarette sales to both Indians and non-Indians constitute a substantial portion of Mr. Stagner's business. He orders his cigarettes from an Idaho company and has them delivered to the West Route Trading Company by Salt Creek Freightways.

On March 5, 1981, the appellee Wyoming State Tax Commission and State Board of Equalization seized twelve cases of appellant's cigarettes enroute to his place of business. Ten days later as stipulated, the appellee sold those twelve cases of cigarettes for $2,100.00 and added the proceeds to the state general fund. Appellee afforded Mr. Stagner no notice of the seizure and they initiated no hearing or legal action concerning the seizure. During the course of a phone call placed by appellant's counsel to counsel for the appellee subsequent to this seizure, the assistant attorney general mentioned that appellant could request an agency hearing. Appellant did not do so because he could find no procedures for requesting or conducting such a hearing.

Mr. Stagner sought judicial review of the March 5, 1981, cigarette seizure in the District Court of the Ninth Judicial District of the State of Wyoming. Appellee moved to dismiss the action on the grounds that it was filed more than thirty (30) days after the cigarette seizure. The district court denied appellee's motion, but later dismissed the case on the grounds that Mr. Stagner failed to exhaust administrative remedies. See appendix hereto, p.32a, *infra.* The Supreme Court of Wyoming, ruling on appeal of the dismissal, determined that appellant lacked an administrative remedy but that the district court properly dismissed the action because it was filed more than thirty (30) days subsequent to the cigarette seizure. See appendix hereto, p.28a, *infra.*

On June 9, 1982, the appellee seized thirteen cases of cigarettes enroute to the West Route Trading Company. The following day, appellant initiated legal action by filing a "Petition

for Declaratory Judgment and Temporary Restraining Order"[1] Subsequent to oral argument on the Petition for Temporary Restraining Order on June 10, 1982, the parties agreed that appellant would pay the state cigarette tax under protest and that appellant's cigarettes which were seized the preceding day would be forwarded to him. Rather than delineating how appellant was to identify customers subject to taxation and what records he must keep on each sale, the parties stipulated to a procedure whereby he would pay tax under protest on a percentage of his total cigarette sales.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED

Appellant raised the questions presented by this appeal in both his "Petition for Declaratory Judgment and Temporary Restraining Order" and his brief in the district court. That Court considered and expressly rejected each of appellant's arguments. See the appendix hereto, p.18a, *infra.*

In the Supreme Court of Wyoming, appellant again raised his two due process claims, as well as his treaty and preemption claim. See the statement of arguments in the *Table of Contents* from appellant's brief to the Supreme Court of Wyoming, set forth in the appendix hereto, p.35a, *infra.* The Supreme Court of Wyoming decided that appellant lacked standing to raise his due process objections to §39-6-106, W.S. 1977. See the opinion of the Supreme Court of Wyoming in this case, set forth in the appendix hereto, p.1a, *infra,* and the letter from the Court, p.37a, *infra.* Further, the Court rejected appellant's treaty and preemp-

1. Appellee gave Mr. Stagner no notice of this second seizure. The Supreme Court of Wyoming stated in its opinion that "In this case, appellant was notified of the seizure and was given an opportunity for a hearing." See p.11a, *infra.* Appellant was notified of this second cigarette seizure only through a phone call from employees of Salt Creek Freightways, the carrier of his cigarettes. The Supreme Court of Wyoming did not make clear whether appellant's opportunity for a hearing was administrative or judicial. In fact, there was no offer of administrative hearing regarding the second seizure and there is no evidence of such in the record. Accordingly, it must be presumed that the Court was referring to appellant's "opportunity for a hearing" in the district court. This "opportunity" existed only because appellant initiated a lawsuit seeking a declaratory judgment and temporary restraining order.

tion argument, stating that " . . . . the statute is not discriminatory because it provides different sanctions in different circumstances for failure to comply." (p.12a, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

The ruling of the Supreme Court of Wyoming in this case runs counter to the long line of due process cases decided by this Court concerning deprivations of property. The factors to be considered in determining what process is due were enunciated in *Mathews v. Eldridge,* 424 U.S. 319,335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976):

> first, the private interest that will be affected by the offical action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute requirement would entail.

State officials in this case twice deprived Mr. Stagner of a substantial interest in property. In seizing appellant's cigarettes, the state not only interfered with his right to enjoy his possessions; they jeopardized his very livelihood as well. The private interest at stake here is paramount.

The risk of an erroneous deprivation of property in this case was exceedingly high. State officials are not required to carry out any administrative or judicial procedures to determine the probable validity of cigarette seizure either before or after it takes place. Additional procedural safeguards would undoubtedly be of great value.

The State has an important interest in collecting its revenues. That interest, however, is protected as soon as the State has seized cigarettes. Provision for prompt post-seizure notice and hearing to the owner of seized cigarettes would entail only slight fiscal and administrative burdens.

Section 39-6-106, W.S. 1977, authorizes appellee to seize cigarettes, sell them and add the proceeds to the state general fund with no requirement of any form of notice or hearing. The State of Wyoming has on two occasions intercepted property

belonging to an Indian on the Reservation. On the first such occasion, the State sold the seized property ten days later and deposited the proceeds in the general fund as §39-6-106, W.S. 1977, requires without a determination ever being made as to whether there was any basis for the seizure. On the second occasion, Mr. Stagner had his cigarettes returned to him only because he managed to hear of the seizure and get into court to request a temporary restraining order before the state sold his cigarettes a second time.

The Supreme Court of Wyoming conceded in its opinion concerning the first cigarette seizure in this case that the owner of seized cigarettes has no administrative remedy. See appendix hereto, p.28a, *infra.* The Court cited the statute requiring exhaustion of administrative remedies prior to seeking judicial review, then stated that the cigarette seizure was subject to judicial review. In deciding the first case between these parties, the Supreme Court of Wyoming found it immaterial that appellee made an informal offer of hearing to appellant.

As discussed in Note 1, p.4, *supra,* the Supreme Court of Wyoming decided in the second seizure case that appellant was afforded proper due process and therefore lacked standing to challenge the constitutional adequacy of §39-6-106, W.S. 1977, because he "was notified of the seizure and was given an opportunity for a hearing." See p.11a, *infra.* The Court reached this conclusion despite the fact that (1) appellee afforded appellant no notice, and (2) appellant received an opportunity for a hearing only because he instituted an independent legal action.

Appellant's only alternative to filing his "Petition for Declaratory Judgment and Temporary Restraining Order" would have been to seek judicial review of administrative action pursuant to the Wyoming Administrative Procedure Act. That course would likewise have required appellant to shoulder the burden of initiating legal action. However, the district court affording judicial review of the cigarette seizure lacks the authority to order that seized cigarettes be returned to the owner or that the owner be made whole in some other fashion. See the District Court's Order of Dismissal in the appendix hereto, p.32a, *infra.*

If the owner of cigarettes seized in Wyoming does not initiate legal action, his property is confiscated without any

determination ever being made of the validity of the seizure. This violates all that due process stands for. It is a fundamental principle of due process that some form of notice and hearing is required before a person may be finally deprived of a property interest. See *Mathews v. Eldridge, supra, Mitchell v. W.T. Grant Company,* 416 U.S. 600, 40 L.Ed.2d 406, 94 S.Ct. 1895 (1974), *Logan v. Zimmerman Brush Com[any,* 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982), *Barry v. Barchi,* 443 U.S. 55, 61 L.Ed.2d 365, 99 S.Ct. 2642 (1979).

Further, this Court has held that a statute authorizing a property deprivation must itself provide for notice and an opprotunity to be heard. *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 59 L.Ed. 1027 (1915), *Security Trust & S.B. Co. v. Lexington,* 203 U.S. 323, 51 L.Ed. 204 (1906). Consistent with this view, state supreme courts have held that state statutes or regulations must provide notice and hearing to comply with federal constitutional requisites of due process where there is state deprivation of a property interest. *Federal Savings and Loan Association of Lincoln v. Dept. of Banking,* 187 Neb. 562, 192 N.W.2d 736 (1971), *Farnow v. Dept. of Eighth Judicial Dist. Court,* 64 Nev. 109, 178 P.2d 371 (1947), *H. Moffat Co. v. Hecke,* 68 Ca.App. 35, 228 P. 546 (1924).

These opinions require statutory provision for notice and hearing in order to satisfy minimal guarantees of due process and protect against arbitrary and discriminatory state action. Statutory notice and hearing provisions also further the need for predictability and consistency in the law. The possibility of discriminatory agency action runs high in this case. This Court should enforce the basic due process requirements in order to ensure evenhanded administration of state law on the Reservation.

In *Barry v. Barchi, supra,* this Court decided that even though New York law provided an administrative hearing to horse trainers whose licenses had been suspended, the law was nonetheless constitutionally infirm because it failed to specify when the hearing must be held and it allowed up to thirty days after the hearing for issuance of an administrative order. Surely, then §39-6-106, W.S. 1977, must likewise be constitutionally infirm. That statute authorizes a final deprivation of property by the state without even mentioning notice or hearing. The

Supreme Court of Wyoming's decision of this issue conflicts with the consistent due process holdings of this Court.

The Supreme Court of Wyoming has refused to adhere to this Court's prior decisions concerning vagueness as well as procedural due process. This Court has repeatedly declared that statutes must be clear in what they require; laws whose application are subject to speculation violate due process. *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, 45 S.Ct. 126 (1926), *Coates v. City of Cincinnati*, 402 U.S. 611, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971), *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618 (1938), *Cramp v. Board of Public Instruction*, 368 U.S. 278, 7 L.Ed. 2d 285, 82 S.Ct. 275 (1961).

The State has confiscated the property of a Reservation Indian in this case for failure to comply with nonexistent requirements for collecting the state cigarette tax. Appellant can only guess at the applicability to him of the Wyoming cigarette tax statutes. Until the issuance of the Supreme Court of Wyoming decision on appeal here, the incidence of the tax was subject to question. If the incidence was on the wholesaler, Mr. Stagner would have no obligation to collect the tax. *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 48 L.Ed.2d 96, 96 S.Ct. 1634 (1976). Now that the incidence of the tax has been held to be on the consumer, he is still left at his peril to guess how to identify customers subject to the cigarette tax and what records he must keep. As previously noted on p.4, *supra*, the parties had to stipulate to a procedure for Mr. Stagner to collect the tax when they agreed that he would pay it under protest during the pendency of this case. No state statute or agency regulation even mentions Indians in connection with the Wyoming cigarette tax.

In contrast to Wyoming, the State of Washington has a very specific statutory and regulatory scheme for collection of that state's cigarette tax by Indian dealers on the Reservation. This Court noted in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980), that Washington law required Indian cigarette dealers to request all customers not personally known to present a tribal identification card, collect the tax from all nonmembers of the Tribe and keep detailed records.

Mr. Stagner has no such guidance. Both Shoshone and Arapahoe Indians reside on the Wind River Indian Reservation. The Tribes do not issue tribal identification cards. Should appellant ask his customers whether they are enrolled Shoshones or Arapahoes and collect the tax from all persons who say they are not? Should he record just the number of nonexempt sales or keep more detailed records? A course that differs from the wishes of state officials would subject Mr. Stagner to further cigarette seizures and jeopardize his right to possess private property, as well as to carry on his business. Unless this Court reverses this case, appellant will have no way to prevent future state confiscation of his property without discontinuing cigarette sales altogether.

Surely the due process violations in this case warrant this Court's summary reversal. The highest court of the State of Wyoming has upheld the State over an individual Reservation Indian at the cost of denying the most basic constitutional rights. Where a state fails to safeguard the rights of its Indian citizens, this Court has a special obligation to intervene.

If this Court summarily affirms this case, it will signal the State of Wyoming that it may disregard Indian rights with impunity. Future conflicts between tribal interests and those of the State of Wyoming will undoubtedly arise. This Court's decision of the merits of this case should minimize the need for future litigation.

Although the Supreme Court of Wyoming's decision on the treaty and preemption issue herein is not so obviously erroneous as its treatment of the due process issues, appellant's contention that §39-6-106, W.S. 1977, violates the United States Treaty With the Eastern Band Shoshoni and Bannock, appended hereto, p.38a, *infra,* presents an equally substantial federal question. *Moe v. Salish and Kootenai Tribes, supra,* makes clear that the State may not require appellant to be licensed under the state cigarette tax laws because of his federal status as a Reservation Indian. It should be equally clear that the State may not subject appellant to penalties which he would not incur had he held a state license. That is exactly what took place here.

§39-6-106, W.S. 1977, previously cited in full herein, authorizes cigarette seizure, but specifically disallows seizure of "cigarettes in the original unopened shipping package . . . in transit to a licensed wholesaler." It is not disputed that on both occasions when appellee seized appellant's cigarettes, those cigarettes were in original unopened shipping packages in transit to him. Thus the terms of §39-6-106, W.S. 1977, would have prohibited both seizures if appellant were a state licensed wholesaler.

In seizing appellant's cigarettes, the State has impermissibly burdened rights granted to appellant by the United States Treaty With the Eastern Band Shoshoni and Bannock and recognized by this Court in numerous Indian law preemption cases. This state intrusion on Indian rights presents a very troubling and important issue. The enforcement of §39-6-106, W.S. 1977, in this case has effectively penalized Mr. Stagner because of his special status as a federally licensed Indian trader on the Reservation.

The Supreme Court of Wyoming found that the cigarette seizures in this case withstood appellant's treaty attack because of the state's interest in enforcing its taxes. The Court pointed out that there are sanctions other than seizure which are applicable to non-Indians. However, the State may not burden Mr. Stagner's exemption from state licensing requirements merely because he enjoys other treaty rights as well. Federal law defines appellant's Indian status and preempts state law on the subject. The State of Wyoming is not authorized to pick and choose among the treaty rights it will recognize. By subjecting appellant, a law-abiding Indian trader on the Reservation, to penalties he would not have been subject to as a law-abiding non-Indian trader, appellee has violated the United States Treaty With the Eastern Band Shoshoni and Bannock and federal preemption principles.

CONCLUSION

For these reasons, this Court should summarily reverse or remand this case or, in the alternative, should note probable jurisdiction and allow briefs on the merits and oral argument.

Respectfully submitted,

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August, 1984

IN THE SUPREME COURT, STATE OF WYOMING

APRIL TERM, A.D. 1984
May 22, 1984

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,	)	
Appellant (Petitioner),	)	
v.	)	No. 83-186
WYOMING STATE TAX COMMISSION and STATE BOARD OF EQUALIZATION,	)	
Appellees (Respondents).	)	

Appeal from the District Court of Laramie County, the Honorable Joseph F. Maier, Judge.

Carol Herman, Wind River Legal Services, Inc., Fort Washakie, for appellant.

A. G. McClintock, Attorney General, and Ron Arnold, Assistant Attorney General, for appellees; oral argument by Mr. Arnold.

Before ROONEY, C.J., and THOMAS, ROSE, BROWN, and CARDINE, JJ.

NOTICE: This opinion is subject to formal revision before publication in Pacific Reporter Second. Readers are requested to notify the Clerk of the Supreme Court, Supreme Court Building, Cheyenne, Wyoming 82002, of any typographical or other formal errors, in order that corrections may be made before final publication in the permanent volume.

CARDINE, Justice.

This appeal is from an order denying relief sought in a declaratory judgment action involving construction of the Wyoming cigarette tax statutes. The parties stipulated to the relevant facts. The court held against appellant on all issues.

We will affirm.

Appellant, Clyde Stagner is an enrolled member of the Shoshone tribe of Indians of the Wind River Indian Reservation. He owns and operates the West Route Trading Company located on the reservation. A substantial part of his business involves the sale of cigarettes to enrolled Indians, non-enrolled Indians, and non-Indians. He is not licensed, nor is he required to be licensed by the State of Wyoming to sell cigarettes since he is a member of the Shoshone tribe.

On March 15, 1981, the Wyoming State Tax Commission and State Board of Equalization, seized and sold twelve cases of cigarettes enroute to Mr. Stagner. This seizure was an agency action subject to judicial review; however, the request for review was not timely and therefore was dismissed. On June 9, 1982, the Wyoming State Tax Commission and State Board of Equalization seized thirteen cases of cigarettes enroute to Mr. Stagner. Appellant filed a declaratory judgment suit seeking a ruling that the statutes under which this action was taken by the State of Wyoming were unconstitutional. Then, pursuant to stipulation of the parties, appellant paid the tax on the cigarettes seized on June 9, 1982, and the State Board released the cigarettes to him.

Although appellant presents several issues on this appeal, there are just two issues which we must decide in resolving the case:

> 1. Does the statute impose the Wyoming cigarette tax upon the seller or upon the retail purchaser or consumer of the cigarettes?
>
> 2. Was the seizure of petitioners' cigarettes by the State legally justified under the facts of this case?

I

The United States Supreme Court recently clarified the law concerning state taxation on cigarette sales made on Indian reservations in Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). The Court again said that an Indian vendor cannot be required to obtain a state license and that a cigarette sales tax cannot be imposed upon on-reservations sales by Indians to Indians. It held, however, that the State can lawfully impose a cigarette tax on sales by Indians to non-Indians. The Montana statute in question provided that the cigarette tax was a direct tax on the retail consumer, precollected for purposes of convenience and facility only. The Court in a policy discussion stated:

> "* * * Since nonpayment of the tax is a misdemeanor as to the retail purchaser, the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout his legal obligation to pay the tax. Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." (Footnote and emphasis omitted.) 96 S.Ct. at 1645.

And continuing also stated:

> "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful

tax. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language of Mescalero [Apache Tribe v. Jones 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973)], dealing with the 'special area of state taxation.' We see nothing in this burden which frustrates tribal self-government, see Williams v. Lee, 358 U.S. 217, 219-220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251, 253 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, United States v. McGowan, 302 U.S. 535, 539, 58 S.Ct. 286, 288, 82 L.Ed. 410, 413 (1938): 'Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments.' See also Thomas v. Gay, 169 U.S. 264, 273, 18 S.Ct. 340, 343, 42 L.Ed. 740, 744 (1898). We therefore agree with the District Court that to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof." 96 S.Ct. at 1646.

In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), the United States Supreme Court in resolving other questions relating to state taxation of cigarette sales reaffirmed the holding of Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, supra, stating:

"Moe establishes several principles rel-

> evant to the present cases. The State may sometimes impose a nondiscriminatory tax on non-Indian customers of Indian retailers doing business on the reservation. Such a tax may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians. And the State may impose at least 'minimal' burdens on the Indian retailer to aid in enforcing and collecting the tax. * * *" (Footnote omitted.) 100 S.Ct. at 2080.

The Court held in Washington v. Confederated Tribes of Colville Indian Reservation, supra, that the exemption applicable to tribal members could not be extended to Indians who are nonmembers of the tribe. Washington's cigarette sales tax falls upon the first event which may constitutionally be subjected to it. The incident of the tax is on the seller in cases of sales by non-Indians to non-Indians. In a case where the retailer is exempt from the tax, the first taxable event is the use, consumption of or possession by a non-exempt purchaser.

The decisions in both United States Supreme Court cases were based on the fact that the applicable statutes provided for the incident of the tax to fall on the consumer. Both parties in this case agree that the State of Wyoming may not impose the tax upon appellant nor require him to obtain a state license for the sale of cigarettes. They also agree that sales by appellant to enrolled Indians of the Shoshone and Arapahoe tribes are exempt. Appellant contends that Wyoming's cigarette sales tax statutes provide that the incident of the tax is upon the wholesaler; that, therefore, as an enrolled Indian, he is exempt from this tax and it should not be enforced against him. The State contends that the Wyoming legislature imposed the tax upon the sale thereby placing the incidence of the tax upon the purchaser. Section 39-6-103, W.S. 1977, Cum.Supp. 1983, provides:

> "(a) There is levied and shall be collected and paid to the board an excise tax of four-tenths of a cent ($.004)

upon the sale of each cigarette sold by wholesalers.

"(b) Sales of cigarettes to any agency of the United States government, sales in interstate commerce or the taxation of any transaction prohibited by the United States Constitution are exempted from the provisions of this article but shall be reported to the board in the manner prescribed by it.

"(d) There is levied and shall be paid to the board an excise tax of forty one hundredths of a cent ($.0040) upon the use or storage by consumers of cigarettes in Wyoming but only if the tax imposed by subsections (a) and (b) of this section has not been paid." (There is no subsection (c) in this section as it appears in the printed acts.)

In 1977 the legislature revised the cigarette tax sales statutes. Prior to that time § 39-163, W.S. 1957, Cum.Supp. 1975, provided that:

"(a) There is hereby levied and shall be collected and paid to the state board of equalization an excise tax upon the sale of cigarettes by wholesalers of four mills on each cigarette; provided, however, that the burden of paying such tax shall be passed, through subsequent sales of the cigarettes taxed, to the ultimate purchasers and consumers of such cigarettes and such tax so passed shall be deemed a direct tax paid by the said ultimate purchasers and consumers." (Emphasis added.)

Appellant argues that the deletion of the proviso evidences legislative intent to shift the incidence of the tax from the consumer to the seller. We cannot agree with this pro-

position. The deletion could equally indicate a legislative determination that the proviso was unnecessary.

> "* * * [I]t is a well-established principle that in construing a legislative enactment we must, if possible, ascertain the intent of the legislature from the wording of the statute. * * *" Wyoming State Department of Education v. Barber, Wyo., 649 P.2d 681, 684 (1982).
>
> "All portions of the act must be read in pari materia, and every word, clause and sentence of it must be given effect * * *." Haddenham v. City of Laramie, Wyo., 648 P.2d 551, 553 (1982).
>
> "A basic tenet of our judicial system is that a statute must be read in light of its purpose. If a statute is clear on its face and the results produced by a literal reading help bring about the stated objective, we will not entertain strained constructions which impede the legislative policy. * * *" (Citation omitted.) People v. Platte Pipe Line Company, Wyo., 649 P.2d 208, 212 (1982).

The words must be given their plain and ordinary meaning. Herring v. Welltech, Inc., Wyo., 660 P.2d 361 (1983). That meaning becomes obvious when applied to the facts in this case.

Section 39-6-101, W.S. 1977, definitions, provides:

> "(a) As used in this article:
>
> "(i) 'Sale' * * * means any * * * transfer of * * * possession within the state * * *;
>
> * * * * *
>
> "(iii) Wholesaler means any person who:
>
> "(A) Imports cigarettes into this state for sale * * *."

Appellant imported cigarettes into this state for sale and he was a wholesaler. He transferred possession of the cigarettes to non-Indians and that was a sale. Section 39-6-103, W.S. 1977, supra, provides that "there * * * shall be collected * * * four-tenths of a cent ($.004) upon the sale of each cigarette sold by wholesalers." (Emphasis added.) It would be a strained construction of the statute for us to conclude that the legislature intended that the wholesaler collect the tax from himself upon the sale to a purchaser. We decline to adopt that construction. "Collect" is said to mean "to receive, gather, or exact from a number of persons or other sources," Webster's Third International Dictionary (1961). The plain meaning of the term "collect" is to obtain something from another. Here the legislative intent is clear. The appellant was to "collect" the tax from the purchaser. The words "shall be collected * * * upon the sale" places the incident of the tax upon the purchaser.

Subsection (b) of § 39-6-103, supra, provides that taxes are not to be collected on sales to a tax exempt agency. Appellant, though a wholesaler by definition, was tax exempt under this subsection. The tax by statute could not be imposed upon him, and this provision is further evidence of the legislative intent that the tax was upon the consumer. Every word, clause and sentence must be given meaning. A statute must be construed so that no part is inoperative or superfluous. Thomson v. Wyoming In-Stream Flow Committee, Wyo., 651 P.2d 778 (1982).

Appellant claims that his analysis of the cigarette sales tax statutes is supported by the fact that the statutes are couched in terms of "wholesalers" not consumers. However, the 1977 revision is not significantly different from the 1957 act and amendments. The 1967 amendment specifically provided that the consumer would pay the tax. That article was also primarily couched in terms of wholesalers. The wholesaler receives a six percent discount because of the burden imposed upon him in affixing the stamps. It would be senseless for the legislature to give a discount to a person owing taxes for paying taxes that he owes. This discount evidences the fact that the tax was not upon the wholesaler but upon the purchasers and consumers. We note also that no distribution of the revenues are made pursuant to

§ 39-6-108, W.S. 1977, until a monthly return is filed which shows sales. This indicates also a legislative intent to impose the tax upon the consumer.

Appellant contends that subsection (d) supports his position that the wholesaler is obligated to pay the tax. We construe this section as obligating the consumer personally to pay the tax if he has not complied with subsection (a) which requires payment of the tax to the wholesaler.

Therefore, we hold that the cigarette sales tax statutes require appellant to collect tax on cigarettes sold to non-Indians and to Indians who are not enrolled members of the Shoshone or Arapahoe Tribes.

II

The State Board on two occasions seized cigarettes purchased by and enroute to appellant. Section 39-6-106(a), W.S. 1977, provides for seizure of cigarettes under certain circumstances.1/ Appellant contends that this statute is unconstitutional in that it improperly distinguishes between licensed and unlicensed wholesalers; it violates the due process clauses of the federal and state constitutions; and it did not authorize the seizure of appellant's cigarettes.

1/ Section 39-6-106, W.S.1977, provides in part:

> "(a) Any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by this article are contraband goods and may be seized without a warrant by the board or any peace officer of this state when so directed by the board. This section does not apply to cigarettes in the original unopened shipping package in the possession of or in transit to a licensed wholesaler or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article."

Appellant contends that the statute is unconstitutional because it does not provide for a notice or hearing. The record in this case confirms that appellant was notified of the seizure and that the cigarettes were returned to him the day after the seizure pending the outcome of this suit. A court is without jurisdiction to determine that a statute is irreconcilable with the constitution except

> "* * * 'as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' [Citation.] Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. * * *" United States v. Raines, 362 U.S. 17, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960).

The United State Supreme Court held, in Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975), that

> "* * * [a]s an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The Art. III judicial power

> exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action * * *.'" (Citations omitted.)

In Alberts v. State, Wyo., 642 P.2d 447 (1982), appellant claimed that a statute was unconstitutional on its face because it did not set forth proper procedures and guidelines. We held that appellant did not have standing to raise those issues because

> "* * * [t]he constitutionality of a statute may not be attacked by one whose rights are not adversely affected by the operation thereof. * * *" Id. at 452.

In that case, the procedures appellant was protesting were not applied against him. The constitutionality of a statute can only be challenged if it is applied to or is about to be applied to the party contesting its validity. Walgreen Co. v. State Board of Equalization, 70 Wyo. 193, 246 P.2d 767 (1952). We have stated that the rule with regard to standing is one that

> "* * * with the limited exception of challenges to statutes that broadly prohibit speech protected by the First Amendment, a party must demonstrate the matter in which his own rights are adversely affected in light of the circumstances before the court in order to present his constitutional challenge." Armijo v. State, Wyo., 678 P.2d 864, 868 (1984).

In this case, appellant was notified of the seizure and was given an opportunity for a hearing. Therefore, he does not have standing to contend that the statute is unconstitutional for lack of procedural due process because the alleged inadequacies of the

statute were not applied to him; we will not decide the constitutionality of the statute as it might be applied to third parties or to hypothetical situations.

Appellant also contended that the seizure was wrongful and not authorized under § 39-6-106, W.S. 1977, supra. The statute provides that cigarettes found in this state without stamps required by law may be seized. Two exemptions from this provision are granted. First, the section does not apply to cigarettes in the original unopened shipping package in possession of or in transit to a licensed wholesaler. Appellant is not a licensed wholesaler and not exempt under this language of the statute. He claims the statute discriminates against him because he is an enrolled Indian who is not required to be licensed and, therefore, it is unconstitutional. However, appellant's cigarettes were not seized because he was unlicensed, but because he was evading the cigarette tax. Seizure is not a necessary sanction for licensed wholesalers. Other remedies are available, such as license revocation, fines, and imprisonment.2/ By virtue of appellant's status as an Indian, he is exempt from licensing and its attendant burdens. However, he is not exempt from a lawful compliance with the state taxing statutes. The statute is not discriminatory because it provides different sanctions in different circumstances for failure to comply. There is no discrimination against appellant by the seizure to enforce the lawful exercise of tax collection. This was a lesser sanction than would have been imposed upon a licensed wholesaler who was willfully and intentionally evading the tax.

A second exemption is granted to owners of cigarettes not willfully or intentionally evading the tax. This exemption was not available to appellant who had known for several years that the State of Wyoming contended that he was obligated to collect the tax when he sold cigarettes to non-Indian consumers. The State's interest in resolving this question necessitated the seizure.

2/ Section 39-6-102(c), W.S.1977, provides:

> "(c) The board may revoke the license of any wholesaler violating any provision of this article after a hearing. No license shall be issued to a wholesaler for two (2) years following revoca-

The United States Supreme Court held in Washington v. Confederated Tribes of Colville Indian Reservation, supra, 100 S.Ct. at 2085, that

> "* * * [a]lthough the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the State has validly imposed. * * *"

Having found the tax is upon the purchaser or consumer, that the statutes providing for the tax are constitutional, and that the seizure was lawful, the order of the district court is

Affirmed.

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tion of his license."

Section 39-6-110, W.S.1977, provides:

"(a) The following acts are misdemeanors punishable by a fine of not more than one hundred dollars ($100.00) or imprisonment in the county jail for not more than six (6) months or both:

"(i) Selling or distributing cigarettes as a wholesaler without a license;

"(ii) Selling, offering to sell, displaying for sale or possessing with intent to sell cigarettes without proper stamps, imprints or impressions;

"(iii) Evading or aiding or abetting any person to evade the payment of the taxes imposed by this article;

"(iv) Making any false or fraudulent return.

"(b) Each act in violation of subsection (a) of this section is a separate offense.

"(c) The penalties specified in this section are in addition to the provisions of W.S. 39-6-106."

IN THE DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT
LARAMIE COUNTY, STATE OF WYOMING

FILED

DEC 10 1982

GERRIE E. BISHOP
CLERK DISTRICT COURT

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,	
Petitioner,	
vs.	STIPULATION
WYOMING STATE TAX COMMISSION and STATE BOARD OF EQUALIZATION,	Civil No. 98-198
Respondent.	

THIS STIPULATION is made and entered into on the _____ day of _____, 1982, by and between Carol Herman, Attorney for Clyde F. Stagner, and Ron Arnold, Attorney for the Wyoming State Tax Commission and State Board of Equalization. The parties hereto agree that the following facts are true. Both parties, however, reserve the right to contend that any one or all of the facts recited below are irrelevant or immaterial to the issues before the Court in the above-named action.

1) Clyde F. Stagner, the Petitioner, is an enrolled member of the Shoshone Tribe of Indians of the Wind River Indian Reservation and resides within the said Reservation.

2) Respondent Wyoming State Tax Commission and State Board of Equalization is the State of Wyoming for all legal purposes.

3) The Shoshone Tribe is a sovereign Indian Tribe officially recognized by the United States Government and situate on the Wind River Indian Reservation.

4) Clyde F. Stagner is a citizen of the United States and the State of Wyoming.

5) Clyde F. Stagner owns and operates the West Route Trading Company located on the Wind River Indian Reservation on land held in trust by the United States Department of the

Interior, Bureau of Indian Affairs, and leased to Mr. Stagner on April 1, 1977, for a period of twenty-four (24) years.

6) The United States Department of the Interior, Bureau of Indian Affairs, issued a five (5) year Trader's License to Clyde F. Stagner on March 26, 1979, to conduct a retail trading business on the Wind River Indian Reservation.

7) A substantial part of Mr. Stagner's business at the West Route Trading Company involves sales of cigarettes to enrolled Indians, non-enrolled Indians and non-Indians.

8) Clyde F. Stagner does not have a current license to sell cigarettes in this state pursuant to § 39-6-102, W.S. 1977.

9) The cigarettes which Clyde F. Stagner sells at the West Route Trading Company are supplied to him by the Powers Candy Company of Pocatello, Idaho.

10) Salt Creek Freightways, a non-Indian owned and operated business, picks up cigarettes destined for the West Route Trading Company and delivers them from Idaho to the Salt Creek Terminal located on non-Indian owned land on the Wind River Indian Reservation.

11) On March 15, 1981, the Wyoming State Tax Commission and State Board of Equalization sold for $2,100.00 twelve cases of cigarettes belonging to Mr. Stagner which were seized on March 5, 1981. If Mr. Stagner is ultimately successful on the merits of this case, the $2,100.00 will be refunded to him.

12) On June 9, 1982, the Wyoming State Tax Commission and State Board of Equalization seized thirteen (13) boxes of cigarettes belonging to Mr. Stagner at the docks of Salt Creek Freightways in Jackson, Wyoming. Pursuant to the parties' Stipulation, the cigarettes were forwarded to Mr. Stagner on June 10, 1982.

13) Cigarettes are generally shipped as follows: manufacturers ship cigarettes to wholesalers in perforated boxes, one brand per box; wholesalers slice the boxes in half, leaving the cigarettes inside; then with strapping tape, they seal together two different halves containing different brands of cigarettes to form a new box. The newly sealed boxes are then shipped to retailers. This was the procedure utilized by Powers Candy Co., acting as wholesalers, in shipping the cigarettes referred to above in paragraphs 11 and 12.

14) From the time he began selling cigarettes, Mr. Stagner has believed that as an Indian trader on the reservation, he is exempt from the obligation to pay the state cigarette tax. He has known for several years that the Wyoming State Tax Commission and State Board of Equalization contends that he has an obligation to pay the state cigarette tax on sales to non-Indians.

Carol Herman
Attorney for Petitioner

Subscribed and sworn to before me this 6th day of December, 1982, by Carol Herman.

E. Leona Davis
Notary Public

(SEAL)
My Commission Expires:

Aug. 6, 1984

E. LEONA DAVIS Notary Public
County of Fremont State of Wyoming
My Commission expires August 6, 1984

Ron Arnold
Ron Arnold
Attorney for Respondent

Subscribed and sworn to before me this 10th day of December, 1982, by Ron Arnold.

Notary Public

(SEAL)
My Commission Expires:

STATE OF WYOMING) IN THE DISTRICT COURT
) ss.
COUNTY OF FREMONT) NINTH JUDICIAL DISTRICT

CLYDE F. STAGNER d/b/a WEST ROUTE TRADING COMPANY,
Petitioner,

vs.

WYOMING STATE TAX COMMISSION and STATE BOARD OF EQUALIZATION,
Respondent.

Civil No. 98-198

FILED
AUG 9 1983
GERRIE E. BISHOP
CLERK OF THE DISTRICT COURT

ORDER

THIS MATTER having come before the Court on Petitioner's petition for declaratory judgment, the parties having entered into a written stipulation of facts and both parties having filed briefs and having waived oral argument and the Court having fully considered the submitted briefs finds as follows:

1. That the petition for declaratory judgment be and it is hereby denied.

2. That the letter opinion dated July 20, 1983, should form the basis of this order.

WHEREFORE IT IS HEREBY ORDERED:

1. That the petitioner for declaratory judgment be and it is hereby denied.

2. That the letter opinion dated July 20, 1983, be and it is hereby incorporated herein and made a part of this order.

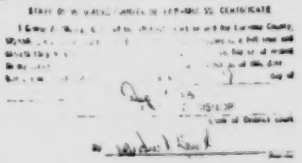
DONE in Open Court this 9 day of August, 1983.

/s/ Joseph B. Maier
DISTRICT COURT JUDGE
FIRST JUDICIAL DISTRICT

Approved as to form:

Carol Herman

Carol Herman
Attorney for Petitioner



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The State of Wyoming
First Judicial District

JOSEPH F. MAIER
JUDGE
P. O. BOX 343
CHEYENNE, WYOMING

JAMES E. GRIGSBY
COURT REPORTER

July 20, 1983

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State of Wyoming
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Re: Laramie County Civil Docket 98-198; Stagner v. State Tax Commission

Dear Ms Herman and Gentlemen:

In this case the plaintiff filed a complaint seeking relief by way of declaratory judgment construing the Wyoming cigarette tax statutes in the light of the United States constitutional provisions relating to due process and equal protection and the Wyoming constitutional provisions of Article 1, Sections 3 and 34, and as being in conflict with 42 U.S.C. Sec. 1981. The matter was submitted to the Court upon a stipulation of facts and briefs. No evidence was taken, except that submitted by the stipulation of facts. Relevant portions of the stipulated facts will be referred to when appropriate in the course of this letter opinion.

Petitioner, in his brief, asserts what is alleged to be eight separate issues to be decided. The respondent in its brief sets forth five arguments which it asserts to cover all of the issues before the Court.

At the risk of being criticized for a simplistic approach, it is the view of the undersigned that there are only two issues requiring decision in this case. They are:

1. Do the Wyoming statutes, imposing a tax upon cigarettes, provide for a direct tax, the burden of paying which is on the purchaser or consumer of the cigarettes?
2. Was the seizure of petitioner's cigarettes by the state legally justified under the facts of this case?

In the discussion of question No. 1, the following portions of the stipulated facts are relevant:

1. Clyde F. Stagner, the petitioner, is an enrolled member of the Shoshoni tribe of Indians of the Wind River Indian Reservation and resides within the said reservation. . . .
5. Clyde F. Stagner owns and operates the West Route Trading Company located on the Wind River Reservation on land held in trust by the United States Department of the Interior, Bureau of Indian Affairs, and leased to Mr. Stagner on April 1, 1977, for a period of twenty-four years. . . .
7. A substantial part of Mr. Stagner's business at the West Route Trading Company involves sales of cigarettes to enrolled Indians, non-enrolled Indians and non-Indians.

The foregoing are taken from the stipulation of the parties filed herein on December 10, 1982. An earlier stipulation filed herein on June 10, 1982 also provided the following facts;

1. That both parties agree that for the pendency of this action that there are 5,800 enrolled "Indians" on the reservation.
2. That both parties agree that there are 9,247 non-Indians located in Riverton, Wyoming.
3. That both parties agree that 100% of the "Indian" population purchases from petitioner and 34% of

the non-Indian purchases from petitioner.

And finally, from the December 10th stipulation, paragraph 14 provides:

> "From the time he began selling cigarettes, Mr. Stagner has believed that as an Indian trader on the reservation, he is exempt from the obligation to pay the state cigarette tax. He has known for several years that the Wyoming State Tax Commission and State Board of Equalization contends that he has an obligation to pay the state cigarette tax on sales to non-Indians."

I believe that the present state of the law, as enunciated by the United States Supreme Court in Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) and Washington v. Confederated Tribes of The Colville Indian Reservation, 447 U.S. 134 (1980), makes it clear that a state may levy a tax on the sale of cigarettes even though sold by an Indian dealer on an Indian reservation, so long as the tax levy applies only to sale to non-Indians, and is a direct tax, the burden of which is upon the consumer. Since there is agreement under the stipulated facts of this case that the petitioner sells cigarettes to non-Indians from his premises on the Indian reservation it would seem that the only question remaining for determination is whether or not the Wyoming statute varies from the terms of the Montana cigarette tax statute or the state of Washington cigarette tax statute to an extent rendering the foregoing cases inapplicable in the application of the Wyoming statute to the petitioner in this case.

It seems to be conceded that if the incidence of the tax is on the seller, the state cannot apply the tax to an Indian selling on the reservation. It is further not contested that the state cannot compel the Indian vendor to purchase a state cigarette vendor's license. All that is agreed beyond that is that the state can require an Indian dealer to precollect the tax from non-Indian consumers as a means of precluding tax evasion by the consumers, and thus the state can enforce its tax on cigarettes if the incidence of the tax falls on the consumer.

To determine whether the incidence of the tax falls on the consumer in Wyoming, we need to first look at the statute in Wyoming and then compare it with the statutes of Montana and

Washington, as applied in the Moe and Washington cases, supra. The provisions of W.S. 39-6-103(a) provide as follows:

> "There is levied and shall be collected and paid to the board an excise tax upon the sale of each cigarette sold by wholsalers."

The Session Laws of Wyoming, 1967, Chapter 80, read, in pertinent part, as follows:

> " . . . (a) There is hereby levied and shall be levied and paid to the state board of equalization an excise tax upon the sale of cigarettes by wholesalers of four mills on each cigarette; provided, however, that the burden of paying such tax shall be passed, through subsequent sales of the cigarettes taxed, to the ultimate purchasers and consumers of the cigarettes, and such tax so passed, shall be deemed a direct tax paid by the said ultimate purchasers and consumers."

By the provisions of Chapter 51, Session Laws of Wyoming, 1977, a revision of the Wyoming law as pertaining to cigarette tax, gasoline tax, mine products tax, sales taxes, use tax and inheritance tax was adopted. The title of the act read, in material part, as follows:

> "An act to create W.S. 39-6-101 through 39-6-808; to amend W.S. 24-38, 24-125, 31-16(j), 40-17.8 and 40-74; to renumber W.S. 39-366, 39-369.1, 39-375, 39-376 and 39-377 as 2-2.1, 39-7-101, 39-8-101, 39-8-102 and 39-8-103; and to repeal W.S. 39-161 through 39-204.8, 39-227.1, 39-227.1:1, 39-227.2, 39-227.4, 39-227.5, 39-227.7 through 39-227.11, 39-286 through 39-369 and 39-380 relating to a complete revision of Wyoming laws pertaining to cigarette tax, gasoline tax, mine products taxes, sales taxes, use tax and inheritance tax; eliminating obsolete or fully executed statutes, conforming conflicting or duplicitous sections and eliminating archaic language, sentence structure and form of existing statutes; providing for severability; and providing for an effective date."

It should be noted that the portion of the Session Laws of

1967, Chapter 80, quoted above, appeared in the 1957 statutes, cumulative supplement, as Sec. 39-163.

This section has now been renumbered in the 1977 Wyoming Statutes as Sec. 39-6-103. In the present section since the 1977 Amendment, the proviso clause no longer appears and there has been added a subsection (b) which provides:

> "(b) Sales of cigarettes to any agency of the United States government, sales in interstate commerce or the taxation of any transaction prohibited by the United States Constitution are exempted from the provisions of this article, but shall be reported to the board in the manner prescribed by it."

In reviewing the change in the sections of the statute which levy the tax in question, the respondent in its brief urges that the later draft of Sec. 39-163 was inadvertently dropped by the Legislative Service Office during the 1977 recodification. It is argued that the preamble to Chapter 51 of the Session Laws of Wyoming, 1977, which is quoted above, does not state that substantive changes were intended and that it was only by inadvertence that the revision incorporated the language in the original 1957 statute and not that contained in the subsequent amendments. Respondent says that this was an oversight and that in fact no substantive changes were intended since the title of the bill "revision of excise tax statutes" also support such a finding. From this argument, the respondent suggests that the Court should conclude that the omission of the additional language in the 1977 revision does not affect the interpretation of the statute. Respondent cites Sands, Sutherland Statutory Construction, Volume 1A, Section 28.10, page 327 (3d Ed. 1972) to the effect that the statute incorporated into a code is presumed to be incorporated without change, even though it is reworded and rephrased and in the organization of the code its original sections are separated. (And) that omission from a codification of parts of an act which had originally furnished the basis for deciding it was mandatory did not have the effect of making the part carried into the code only directory. This presumption also embraces prior judicial constructions of the statute.

Alternatively, the respondent argues that the state has

never contended that sales of cigarettes made to Indians were subject to the Wyoming tax, but have only contended that sales made by an Indian to non-Indians is subject to the tax. Constitutionally, under McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973), the tax cannot be imposed on the retailer who is an Indian, as in this case, and therefore the first taxable event permissible under the constitution is the use, consumption or possession by the non-Indian purchaser. Therefore, the respondent argues that the tax in this case falls on that purchaser and that it is therefore permissible, citing the Colville case, supra, at footnote 9 on page 22 of 65 L.Ed.2d.

Petitioner argues this issue in his argument IV and reviews the statutes as they presently exist and urges the conclusion that the tax falls on dealers, not consumers, and that there is nothing in the Wyoming tax statutes to suggest that the legislature intended the incidence of the tax to shift to fall on the first of that which may constitutionally be taxed. Petitioner points out that there is no explicit legislative declaration as to intent regarding incidence of the tax as was found in the Montana statutes in the Moe case. Petitioner further argues that when the legislature revised the tax statutes in 1977 they deleted the pass-on provision entirely and since the legislature has met five times since the enactment of that 1977 act, but has not acted to restore the provision directing that the purchaser pay the tax, one must assume that the legislature deleted the above provision and kept it out because it no longer intended the burden of the tax to fall on the purchaser.

It would do no good to unduly prolong this letter opinion by repetition of the various citations and arguments contained in the briefs of counsel. Suffice it to say that this Court has fully considered and read the briefs and the citations contained therein and believes that the better reasoned cases and the more logical conclusions to be gained from them as applied to the fact situation in this case, directs the Court to accept the arguments of the respondent in this regard. Accordingly, the Court finds that in this case the incidence of the tax on cigarettes is on the consumer in a sale by an Indian dealer to a non-Indian on the reservation and that therefore such a tax may constitutionally be

levied on such consumer, with the seller being required to collect the same for the State of Wyoming.

The second question to which petitioner devotes most of his brief deals with the legal basis for respondent, the State of Wyoming Tax Commission, to seize cigarettes enroute to petitioner, as a means of compelling petitioner to collect the Wyoming cigarette tax from petitioner's non-Indian customers.

Petitioner addresses this issue in several different arguments presented in his brief.

Argument No. I is headed, "FEDERAL PREEMPTION PRECLUDES THE STATE FROM REQUIRING PETITIONER TO OBTAIN A CIGARETTE SALES LICENSE AND FROM SEIZING HIS CIGARETTES FOR LACK OF LICENSE."

Petitioner's argument II is entitled, "SEIZURE OF PETITIONER'S CIGARETTES BECAUSE HE IS A RESERVATION INDIAN WITHOUT A STATE CIGARETTE LICENSE VIOLATED HIS RIGHTS UNDER 42 U.S.C. Sec. 1981."

Petitioner's argument III is entitled, "SEIZURE OF PETITIONER'S CIGARETTES, WHICH WOULD NOT HAVE OCCURRED IF PETITIONER WERE A NON-INDIAN LICENSED WHOLESALER, VIOLATED HIS RIGHTS UNDER THE EQUAL PROTECTION CLAUSE AND ARTICLE 1, SECTION 34 OF THE WYOMING CONSTITUTION."

Petitioner's argument V is entitled, "W.S. 39-6-106 IS UNCONSTITUTIONAL BECAUSE IT PROVIDES FOR SEIZURE OF PRIVATE PROPERTY WITHOUT DUE PROCESS."

Petitioner's argument VI is entitled, "IT IS UNCONSTITUTIONAL TO PENALIZE PETITIONER UNDER THE WYOMING CIGARETTE TAX STATUTES BECAUSE IF AND HOW THEY MIGHT APPLY TO HIM IS UNCLEAR."

Petitioner's argument VII is entitled, "W.S. 39-6-106 DID NOT AUUTHORIZE SEIZURE OF PETITIONER'S CIGARETTES BECAUSE HE DID NOT WILLFULLY OR INTENTIONALLY EVADE THE TAX."

Petitioner's argument VIII is entitled, "W.S. 39-6-106 DID NOT AUTHORIZE SEIZURE OF PETITIONER'S CIGARETTES BECAUSE THEY DID NOT LACK STAMPS, IM-

PRINTS, OR IMPRESSIONS REQUIRED BY W.S. 39-6-101 THROUGH 39-6-110."

With the background of Washington v. Confederated Tribes, supra, the following comments are made to petitioner's arguments.

Argument I raises a straw man that need not be rebutted. Argument I relies on the premise that the state has or is requiring petitioner to obtain a cigarette sales license. That simply is not the case.

Again, argument II is premised upon the claim that the petetioner's rights under the cited federal statute were violated "because he is a reservation Indian without a state cigarette license." It has not been contended and is not now contended by the state that the petitioner was required to have a state cigarette license.

Argument III is not necessary to be decided, because the argument is predicated upon petitioner's construction of Sec. 39-6-106, W.S. 1977 which provides:

> "(a) Any package of cigarettes found in this state without stamps, imprints, or impressions affixed thereto as provided by this article are contraband goods and may be seized without a warrant by the board or any peace officer of this state when so directed by the board. This section does not apply to cigarettes in the original unopened shipping package in the possession of or in transit to a licensed wholesaler or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article."

Stated very breifly and perhaps simplistically, the petitioner's argument is that if the petitioner were a licensed wholesaler, the original unopened shipping packages which were seized could not have been seized under this section and therefore since the state contends they have the right to seize them, it must be because the petitioner was not licensed. From this, petitioner argues that the state is requiring him to have a license in order to avail himself of this exemption from the seizure provisions of the statute and that the state may not do this since he is entitled to sell as an Indian on the reservation free of

the state licensing provisions. This argument ignores the last portion of the quoted subsection, to wit:

> " . . . or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article."

It is the conclusion of this Court that I find inescapable that the petitioner was intentionally evading the state tax, albeit the stipulation of the parties recites that "from the time he began selling cigarettes, Mr. Stagner has believed that as an Indian trader on the reservation, he is exempt from the obligation to pay the state cigarette tax. He has known for several years that the Wyoming State Tax Commission and State Board of Equalization contends that he has an obligation to pay the state cigarette tax on sales to non-Indians." The fact that the petitioner may have a belief as to the legal sufficiency of his position does not change the ultimate fact that he was intentionally evading the tax by his refusal to collect it from his non-Indian customers. The argument then as to the denial of equal protection would fall. In the same connection, petitioner's argument VII is likewise answered because petitioner's argument is devoted to an examination of and construction of the word "willfully" and since the statute uses "willfully or intentionally" that argument too must fall.

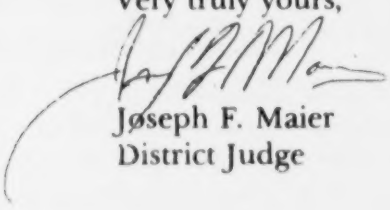
Petitioner's arguments V, VI, and VIII are, I believe, adequately answered by the United States Supreme Court in the Washington v. Confederated Tribes case, supra, when they said:

> "Finally the state contends that it has the power to seize unstamped cigarettes as contraband if the tribes do not cooperate in collecting the state's taxes. The state in fact seized shipments traveling to the reservations from out-of-state wholesalers before being enjoined from doing so by the district court, and it has declared its intention to continue such seizures if successful in this litigation. The tribes contest this power, noting that because sales by wholesalers to the tribal businesses are concededly exempt from state taxation, no state tax is due while the cigarettes are in transit. We find that Washington's interest in enforcing its valid taxes is sufficient to justify these seizures. Although the cigarettes

in transit are as yet exempt from state taxation, they are not immune from seizure when the tribes, as here, have refused to fulfill collection and remittance obligations which the state has validly imposed."

In view of what has been said above, Mr. Arnold will prepare an appropriate order denying the relief sought in the petition, submit the same to Ms Carol Herman for approval as to form and then to the Court for signature and entry. The order will simply refer to this letter opinion and incorporate it by reference.

Very truly yours,



Joseph F. Maier
District Judge

JFM/bb

Clyde F. STAGNER, d/b/a/ West Route Trading Company, Appellant (Petitioner),

v.

WYOMING STATE TAX COMMISSION and State Board of Equalization, Appellees (Respondents).

No. 5630

Supreme Court of Wyoming.

April 6, 1982.

Rehearing Denied May 3, 1982.

Trading company on Indian reservation from which State Tax Commission and State Board of Equalization had seized cigarettes petitioned for judicial review. The District Court of Fremont County, Paul T. Liamos, Jr., J., dismissed cause, and company appealed. The Supreme Court, Rooney, J., held that since more than 30 days elapsed between company's knowledge of seizure and time at which petition for review was filed, the District Court lacked jurisdiction to proceed with cause.

Affirmed.

1. Administrative Law and Procedure ⇐ 722

Timely filing of petition for review of administrative action by district court is mandatory and jurisdictional. Rules App. Proc., Rule 12.04; W.S.1977, § 9-4-114(a).

2. Taxation ⇐ 1337

Seizure by State Tax Commission and State Board of Equalization of cigarettes consigned to trading company on Indian reservation was agency action which was subject to judicial review.

3. Administrative Law and Procedure ⇐ 722

In contested case, required notice of administrative decision will normally start running of 30-day period for obtaining judicial review. Rules App.Proc., Rule 12.04; W.S.1977, § 9-4-114(a).

4. Taxation ⇐ 1337

Where more than 30 days elapsed between seizing of cigarettes from trading company on Indian reservation, company's knowledge thereof and its adverse effect on company and time at which petition for review was filed, district court lacked jurisdiction to proceed with cause. Rules App.Proc., Rule 12.04; W.S.1977, § 9-4-114(a).

David C. Marion and Carol Herman, Wind River Legal Services, Inc., Fort Washakie, for appellant.

Steven F. Freudenthal, Atty. Gen., Ronald P. Arnold and Philip A. Nicholas, Asst. Attys. Gen., for appellees.

Before ROSE, C.J., and RAPER, THOMAS, ROONEY and BROWN, JJ.

ROONEY, Justice

Appellant petitioned the district court for judicial review of appellees' action in seizing some cigarettes which were consigned to appellant on the Wind River Indian Reservation. The seizure was made pursuant to § § 39-6-101 through 39-6-110, W.S.1977[1] (re levy and collection of excise tax on cigarettes). The cause was dismissed by the district court, and appellant appeals from the order of dismissal.

We affirm.

[1] One of the grounds for dismissal of the petition for review was the fact that it was not timely filed. Timely filing of a petition for review is mandatory and jurisdictional. *Department of Revenue and Taxation v. Irvine*, Wyo., 589 P.2d 1295 (1979); and *Snell v. Ruppert*, Wyo., 541 P.2d 1042 (1975).

1. Section 39-6-106(a), W.S.1977, provides:
"(a) Any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by this article are contraband goods and may be seized without a warrant by the board or any peace officer of this state when so directed by the board. This section does not apply to cigarettes in the original unopened shipping package in the possession of or in transit to a licensed wholesaler or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article."

Judicial review of administrative action is governed by Rule 12, W.R.A.P. Rule 12.01, W.R.A.P., provides:

> "To the extent that judicial review of administrative action by a district court is available, any person who is aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or who is aggrieved or adversely affected in fact by any other agency action or inaction, or who is adversely affected in fact by a rule adopted by agency, may obtain such review as provided in this rule."

Rule 12.04, W.R.A.P., provides in pertinent part:

> "In a contested case, or in a noncontested case where a statute places a time limit on appeal, the petition for review shall be filed within thirty (30) days after written, certified notice to all parties of the final decision of the agency or denial of the petition for a rehearing, or, if a rehearing is held, within thirty (30) days after written, certified notice to all parties of the decision thereon, except that upon a showing of excusable neglect based upon the failure of a party to learn of the decision or action, the district court may extend the time for filing the petition for review not exceeding thirty (30) days from the expiration of the original time herein prescribed. * * *"

The extent to which such review is available is prescribed by statute:

> "(a) Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review * * *. The procedure to be followed in such proceeding * * * shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming supreme court." Section 9-4-114(a), W.S.1977.

[2,3] Seizure of appellant's cigarettes was an agency action which was subject to judicial review. However, the request for such review must be timely, i.e., it must be within thirty days of

such action or of notice of such action or of the time the person becomes aggrieved or adversely affected by such action, whichever is latest. A petition for judicial review may be timely if filed within thirty days after a rule or agency action or inaction adversely affects the person although the action, inaction, or adoption of the rule may have occurred long before that time. Likewise, a petition for review may be timely if filed within thirty days after receiving notice thereof although the action, inaction, or adoption of the rule may have occurred long before that time. In a contested case, the required notice of the decision will normally start the running of the thirty-day period.

> "The law is almost elementary that whatever puts a party on inquiry amounts to 'notice.' * * *" *Rodin v. State,* Wyo., 417 P.2d 180, 195 (1966).

[4] In this case, the seizure occurred on March 5, 1981. Appellant does not contest the fact that he knew of the seizure on the same day. He was adversely affected by the seizure at the time of the seizure. But it was not until April 21, 1981, that he filed his petition for review. More than thirty days elapsed between the seizing action, appellant's knowledge thereof, its adverse effect on him, and the time at which the petition for review was filed. The district court properly held that it lacked jurisdiction to proceed with the cause.

Affirmed.

STATE OF WYOMING) IN THE DISTRICT COURT
) ss.
COUNTY OF FREMONT) NINTH JUDICIAL DISTRICT

FILED
OCT 27 1981
VICTOR E. DOLENC CLERK OF COURT
BY..... DEPUTY CLERK

CLYDE F. STAGNER,
d/b/a WEST ROUTE TRADING
COMPANY,

Petitioner,

vs.

Civil No. 20901

WYOMING STATE TAX
COMMISSION AND STATE
BOARD OF EQUALIZATION,

Respondent.

ORDER OF DISMISSAL

This matter came on for oral arguments in Jackson, Wyoming, on September 9, 1981. Carol Herman and David Marion were present on behalf of Petitioner. Respondent was represented by Philip Nicholas. The Court having heard the oral arguments of counsel, having reviewed the entire Court file, and after considering the briefs filed herein finds:

This action is a contested case brought before the Court on a petition for judicial review. Because petitioner did not request a hearing before respondents, he has failed to exhaust his administrative remedies. Had petitioner appealed the seizure a hearing before respondent would have been held and respondent would have prepared findings of fact and conclusions of law. The Court lacks jurisdiction of the matter and there is nothing to consider. This is a petition for review and there is no statutory authority permitting this Court to order the State to return property or to award monetary damages to petitioner. This is not an action for declaratory or injunctive relief. Petitioner is entitled to an opportunity to be heard, however, petitioner must first exhaust his administrative remedies, the court finds that pe-

titioner had other remedies available and a petition for review is not the correct procedure for obtaining judicial review.

NOW THEREFORE IT IS ORDERED, the matter is hereby dismissed.

DATED: October 24, 1981

BY THE COURT:

Paul T. Liamos, Jr.
District Judge

Approved to Form:

Carol Herman
Attorney for Petitioner

IN THE SUPREME COURT, STATE OF WYOMING

RECEIVED
7-3-84
CLERK
WYOMING SUPREME COURT
JUL 3 1984
GITA M. WHITE

CLYDE F. STAGNER d/b/a
WEST ROUTE TRADING COMPANY,

Appellant,
(Petitioner),

vs.

WYOMING STATE TAX COMMISSION
and STATE BOARD OF EQUALIZATION,

Appellees.
(Respondents).

Civil No. 83-186

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Clyde F. Stagner, the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Wyoming, affirming the denial of declaratory relief, entered in this action on May 22, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted;
CLYDE F. STAGNER, Appellant

By: Carol Herman

Carol Herman
Attorney for Appellant
Wind River Legal Services, Inc.
P.O. Box 247
Ft. Washakie, WY 82514

(from the "Brief of Appellant Clyde F. Stagner" in the Supreme Court, State of Wyoming)

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Supreme Court of Wyoming

Cheyenne, Wyoming 82002

JOHN J. ROONEY, CHIEF JUSTICE

August 8, 1984

Carol Herman
Wind River Legal Services, Inc.
P.O. Box 247
Fort Washakie, WY 82514

Re: Stagner v. State Tax Commission — No. 83-186

Dear Mrs. Herman:

I cannot execute the Certificate presented by you inasmuch as we did not speak to the constitutionality of the statute in this case. The opinion speaks for itself.

Very truly yours,

John J. Rooney
Chief Justice

JJR/cm
cc: Attorney General

TREATY WITH THE EASTERN BAND SHOSHONI AND BANNOCK, 1868.

July 3, 1868.
15 Stat., 673
Ratified Feb. 26, 1869.
Proclaimed Feb. 24, 1869.

Articles of a treaty made and concluded at Fort Bridger, Utah Territory, on the third day of July, in the year of our Lord, one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and headmen of and representing the Shoshonee (eastern band) and Bannack tribes of Indians, they being duly authorized to act in the premises:

Peace and friendship.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it.

Offenders among the whites to be arrested and punished.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs, at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Among the Indians to be given up to the United States, etc.

If bad men among the Indians shall commit a wrong or depredation

upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to the laws; and in case they wilfully refuse so to do, the person injured shall be re-imbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating or because of his violating the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Rules for ascertaining damages.

ARTICLE 2. It is agreed that whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the "Port Neuf" and "Kansas Prairie" countries,

Reservation.

and that, when this reservation is declared, the United States will secure to the Bannacks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency-house and residence of agent, in proportion to their numbers, as herein provided for the Shoshonee reservation. The United States further agrees that the following district of country, to wit: Commencing at the mouth of Owl Creek and running due south to the crest of the divide between the Sweetwater and Papo Agie Rivers; thence along the crest of said divide and the summit of Wind River Mountains to the longitude of North Fork of Wind River; thence due north to mouth of said North Fork and up its channel to a point twenty miles above its mouth; thence in a straight line to head-waters of Owl creek and along middle of channel of Owl Creek to place of beginning, shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined

Boundaries.

Who not to reside thereon.

by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

Buildings to be erected by the United States.

ARTICLE 3. The United States agrees, at its own proper expense, to construct at a suitable point of the Shoshonee reservation a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceeding two thousand dollars; an agency building for the residence of the agent, to cost not exceeding three thousand; a residence for the physician, to cost not more than two thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

Mills.

The United States agrees further to cause to be erected on said Shoshonee reservation, near the other buildings herein authorized, a good steam circular-saw mill, with a grist-mill and shingle-machine attached, the same to cost not more than eight thousand dollars.

ARTICLE 4. The Indians herein

named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Reservation to be permanent home of Indians.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency building on the Shoshonee reservation, but shall direct and supervise affairs on the Bannack reservation; and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

Agent to make his home and reside where.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorported with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and

Heads of families desiring to commence farming may select lands, etc.

with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified, and recorded in the "land-book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Effect of such selection.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her. for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a a certificate, containing a description thereof, and the name of the person selecting it, with a certificate indorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the "Shoshone (eastern band) and Bannack land-book."

Persons not heads of families.

Certificates of selection to be delivered, etc., to be recorded.

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title

Survey.

held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper.

Alienation and descent of property.

ARTICLE 7. In order to insure the civilization of the tribes entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

Children between 6 and 16 to attend school.

Duty of agent.

Schoolhouses and teachers.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive

Seeds and agricultural implements.

seeds and agricultural implements for the first year, in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid in value twenty-five dollars per annum.

Instructions in farming.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmers herein provided for, and whenever more than one hundred persons on either reservation shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

Second blacksmith.

Delivery of articles in lieu of money and annuities.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency-house on the reservation herein provided for, on the first day of September of each year, for thirty years, the following articles, to wit:

Clothing, etc.

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woollen socks; for each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico; and twelve yards of cotton domestics.

For the boys and girls under the

ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

Census.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based; and in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if at any time within the ten years it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the tribes herein named, Congress may by law change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

May be changed.

Army officer to attest delivery of goods, etc.

ARTICLE 10. The United States

hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmith, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

Physician, teachers, carpenter, etc.

ARTICLE 11. No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty.

Cession of reservation not to be valid unless, etc.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent, may grow the most valuable crops for the respective year.

Presents for most valuable crops.

ARTICLE 13. It is further agreed that until such time as the agency-buildings are established on the Shoshonee reservation, their agent shall reside at Fort Bridger, U.T., and their annuities shall be delivered to them at the same place in June of each year.

N. G. Taylor, [SEAL.]
W. T. Sherman, [SEAL.]
Lieutenant-General.
Wm. S. Harney, [SEAL.]
John B. Sanborn, [SEAL.]
S. F. Tappan, [SEAL.]
C. C. Augur, [SEAL.]
Brevet Major-General, U.S. Army, Commissioners
Alfred H. Terry, [SEAL.]
Brigadier-General and Brevet Major-General, U.S. Army.

Attest:

A.S.H. White, Secretary.

Shoshones:

Wash-a-kie,	his x mark.
Wau-ny-pitz,	his x mark.
Toop-se-po-wot,	his x mark.
Nar-kok,	his x mark.
Taboonshe-ya,	his x mark.
Bazeel,	his x mark.
Pan-to-she-ga,	his x mark.
Ninny-Bitse,	his x mark.

Bannacks:

Taggee,	his x mark.
Tay-to-ba,	his x mark.
We-rat-ze-won-a-gen,	his x mark.
Coo-sha-gan,	his x mark.
Pan-sook-a-motse,	his x mark.
A-wite-etse,	his x mark.

Witnesses:

Henry A. Morrow,
Lieutenant-Colonel Thirty-sixth Infantry and Brevet Colonel U.S. Army, Commanding Fort Bridger.

Luther Manpa, United States Indian agent

W.A. Carter.

J. Van Allen Carter, interpreter.

Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-278

In The
Supreme Court of the United States
October Term, 1984

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,
Appellant,

v.

WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WYOMING

MOTION TO DISMISS OR AFFIRM

September, 1984

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No. 84-278

—o—

In The

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CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,

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v.

WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION,

Appellee.

—o—

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WYOMING

—o—

MOTION TO DISMISS OR AFFIRM

—o—

The Appellee moves the Court to dismiss the appeal herein or in the alternative, to affirm the judgment of the Supreme Court of Wyoming on the ground that it is manifest that Appellant lacks standing to prosecute this appeal and that the questions upon which the decision of the cause depends are so unsubstantial as not to require further argument.

—o—

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

The Statute

This appeal raises the question of the constitutionality of W.S. 39-6-106. That statute reads:

> (a) Any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by this article are contraband goods and may be seized without a warrant by the board or any peace officer of this state when so directed by the board. This section does not apply to cigarettes in the original unopened shipping package in the possession of or in transit to a licensed wholesaler or to owners of cigarettes not willfully or intentionally evading the tax imposed by this article.
>
> (b) Cigarettes seized in accordance with subsection (a) of this section shall be sold by the board to a licensed wholesaler to the best advantage of the state. Proceeds from the sale shall be remitted to the state treasurer for deposit into the general fund. The licensed wholesaler purchasing the cigarettes shall pay taxes and affix stamps, imprints or impressions as provided by this article on cigarettes so purchased.

This statutory section was relied upon by Appellee to seize Appellant's unstamped cigarettes. No tax was being collected on sales of cigarettes by Appellant.

The Proceedings Below

Appellant sold cigarettes from a store located within the exterior boundaries of the Wind River Indian Reservation. Appellee insisted for many years that Appellant collect tax on cigarette sales to non-Indians. After Appellant informed Appellee that he would not collect the tax, a seizure took place on March 5, 1981. The Wyoming Supreme Court ultimately found that Appellant failed to diligently seek relief from this seizure. *Stagner v. Wyoming State Tax Commission*, 642 P.2d 1296 (Wyo. 1982). Appellant could have timely filed a petition for review and applied for a stay order on the sale pursuant to Rule 12.05 of the Wyoming Rules of Appellate Procedure. This first seizure is not reviewable by this appeal, is not a matter

of record herein, and was improperly raised by Appellant in the Jurisdictional Statement.

The Appellant never collected any taxes after the first seizure, although requested to do so. The Appellee therefore seized a second time, on June 9, 1982, because of Appellant's willful refusal to collect the tax. On June 10, 1982, the Appellant filed an action in the Wyoming District Court seeking declaratory and injunctive relief. The District Court entered an order adverse to Appellant on all issues on Aug. 9, 1983. An appeal was taken to the Wyoming Supreme Court which upheld the District Court. The supreme court entered its judgment and order on May 22, 1984. Appellant filed his Notice of Appeal to this Court on July 3, 1984.

A. The Appellant Lacks Standing To Bring An Appeal To This Court.

The Wyoming Supreme Court specifically found that since Appellant was notified of the seizure and was given an opportunity for a hearing, Appellant does not have standing to contend that W.S. 39-6-106 is unconstitutional for lack of procedural due process. As a result, the Wyoming Supreme Court did not address the issue of constitutionality for want of due process. This Court is not bound by the lower court's holding and must itself determine the matter of standing. *Allied Stores of Ohio v. Bowers,* 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959). The controlling question is whether Appellant has sustained or is immediately in danger of sustaining some direct injury as the result of the statute's enforcement. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275 (1961); *Massachusetts v. Mellon,* 262 U.S. 447, 67 L.Ed. 1078, 43 S.Ct. 597 (1923).

Appellant was not denied an opportunity for a hearing and in fact was offered administrative hearings which were rejected by Appellant. The administrative hearing was specifically provided in the notice of seizure which took place on June 9, 1982. This seizure notice was served on the carrier, Appellant's agent, on June 9 and was given to Appellant's counsel on June 10, 1982, immediately after seizure. The notice was not served directly upon Appellant, as the seizure occurred 150 miles from Appellant's business. The failure to serve the seizure notice was directly attributable to the fact that Appellant filed an action in State District Court on June 10, 1982, and the State District Court determined in open court, where Appellant was represented by counsel, that it would keep jurisdiction of the matter, preempting the offered administrative proceeding, and grant a hearing in District Court. Appellee did affirmatively set forth the seizure notice in its answer filed in District Court on June 28, 1982, App. pp. 1-7. The answer and seizure notice are part of the record in this case. Consequently, Appellant's footnote on page 4 is erroneous and misleading. The issue of whether the statute was being constitutionally administered was never raised nor tried by Appellant.

Appellant never sustained an injury by operation of the statute. In fact, Appellant received a prompt judicial hearing, and could have requested an administrative hearing or filed a petition for judicial review. *Stagner v. Wyoming State Tax Commission, supra.*

B. The Case Presents No Substantial Question Not Previously Decided By This Court.

This Court has previously decided that seizure of cigarettes enroute to an Indian reservation is permissible.

In *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 161, 65 L.Ed.2d 10, 100 S.Ct. 2069 (1980), this Court held that:

> [A]lthough the cigarettes in transit are as yet exempt from state taxation, they are not immune from seizure when the Tribes, as here, have refused to fulfill collection and remittance obligations which the state has validly imposed.

The Appellant, as did the Tribes of Colville, continually refused to collect any tax even though requested to do so on numerous occasions. Appellant's behavior and attitude as repeatedly manifested to Wyoming tax officials necessitated the seizure action.

Appellant also maintains that since W.S. 39-6-106 fails to provide notice and opportunity for hearing, the statute is constitutionally infirm. The authority cited by Appellant is no longer the better reasoned law. This Court in *United States v. Raines,* 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519 (1960), held that the constitutionality of a statute should never be anticipated unless absolutely necessary and that the constitutionality should be limited to the precise facts presented.

The precise facts before this Court amply demonstrate that Appellant received a hearing the day following the seizure. Even though W.S. 39-6-106 contains no hearing requirement, the Wyoming Courts afforded Appellant complete procedural due process. The cigarettes were immediately returned to Appellant and he resold them and collected the tax. Such procedural due process afforded by the Wyoming Courts demonstrates that there is no substantial question of due process which this Court needs to address. *Jennings v. Mahoney,* 404 U.S. 25, 30 L.Ed.2d

146, 92 S.Ct. 180 (1971). Several other courts have followed this holding. *Wiren v. Eide,* 542 F.2d 757 (9th Cir. 1976); *State v. F/V Baranof,* 677 P.2d 1245 (Alaska 1984); *F/V American Eagle v. State,* 620 P.2d 657 (Alaska 1980).

There is no requirement that a hearing be afforded prior to seizure where there is an important governmental interest and there is a special need for prompt action. *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). Certainly Wyoming had an interest in collecting its tax monies. The seizure was necessary as it was the only means to acquire jurisdiction over the property. As mentioned earlier, seizure has been sanctioned by this Court.

The Fourteenth Amendment due process clause requires an opportunity for a hearing at a meaningful time and in a meaningful manner. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982); *Armstrong v. Manzo,* 380 U.S. 545, 4 L.Ed.2d 62, 85 S.Ct. 1187 (1965). Prior to forfeiture, a meaningful judicial hearing was afforded to Appellant. A hearing within one day must certainly be regarded as being timely. Appellant was also provided an opportunity for an administrative hearing, App. pp. 5-6.

Appellant has also failed to present a substantial question under equal protection principles as he has not demonstrated that comparable or similar groups have been given more favorable treatment. *Ellis v. Dixon,* 349 U.S. 458, 99 L.Ed. 1231, 75 S.Ct. 850 (1955).

This Court—in a series of cases from *Washington v. Davis,* 426 U.S. 229 (1976) to *Rogers v. Lodge,* 458 U.S. 613 (1982)—has emphasized that the equal protection

clause can be violated only by purposeful discrimination. *General Building Contractors v. Pennsylvania,* 458 U.S. 375, 391 (1982). Appellant failed to allege and prove that either the Wyoming legislature or the Appellee enacted or administered W.S. 39-6-106 with the intent to purposefully discriminate against Indians.

———o———

CONCLUSION

WHEREFORE, Appellee respectfully submits that as Appellant lacks standing to present the issues and further because the questions presented are so unsubstantial as to not need further argument, Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Wyoming.

DATED this 17 day of September, 1984.

Respectfully submitted,

A. G. McClintock
Attorney General

Peter J. Mulvaney
Deputy Attorney General

Ronald Paul Arnold
Senior Assistant
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APPENDIX

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

IN AND FOR LARAMIE COUNTY, STATE OF WYOMING

Civil No. 98-198

CLYDE F. STAGNER, d/b/a WEST ROUTE TRADING COMPANY,

Petitioner,

vs.

WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION,

Respondent.

ANSWER

(Filed June 28, 1982)

COMES NOW Respondent, by and through the Attorney General and answers petitioner's petition for declaratory judgment as follows:

1. Admits each and every allegation contained within paragraphs 4, 6, 7, 8, 9 and 10 except states that it is without sufficient information or knowledge to form a belief as to the truth and veracity that the cigarettes were worth $3,400.00 and therefore denies the same.

2. States that it is without sufficient information or knowledge to form a belief as to the truth and veracity of those allegations contained within paragraphs 1, 2, 5 and 12 and therefore denies the same.

3. States that for purposes of this lawsuit the Respondent is considered the State of Wyoming pursuant to

W.S. 1-35-101 and therefore denies the allegations contained within paragraph 3.

4. Specifically denies each and every allegation contained within paragraph 11.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that W.S. 39-6-106 is administered in such a manner as to afford due process and equal protection to any person whose cigarettes are seized. A notice of seizure and opportunity for hearing would have been served upon petitioner had this lawsuit not been instituted. Attached hereto and incorporated herein and made a part of these pleadings is the copy of the seizure notice.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that petitioner is wilfully evading the cigarette tax in Wyoming in that he has been notified by respondents that sales of cigarettes to non-Indians were subject to Wyoming excise tax. Moreover, respondents did seize petitioner's cigarettes in March of 1981 and petitioner knew at that time that respondent wanted sales of ciragettes to non-Indians subjected to the excise tax imposed by W.S. 39-6-103.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that W.S. 39-6-106 allows seizure of unstamped cigarettes. That petitioner has incorrectly interpreted this section by alleging that Title 39, Article 6 does not require cigarettes in unopened shipping packages be affixed with stamps. Only a licensed wholesaler can receive unstamped cigarettes pur-

suant to that section and petitioner refuses to license. Respondent is not requiring petitioner to pay any license fee. Respondent is entitled to make seizures whenever the cigarettes are destined to be sold to non-Indians without affixation of stamps or collection of the tax. That petitioner has admitted that he sells cigarettes to non-Indians. The license is only required as a means for respondent to effectively administer sales to non-Indians.

AFFIRMATIVE DEFENSE

Respondent affirmatively asserts that it is immune from suit involving damages and costs of litigation.

WHEREFORE RESPONDENT PRAYS:

1. That the court find that the incidence of the cigarette tax is upon the purchaser.

2. That the court find that W.S. 39-6-106 is constitutionally administered.

3. That the court find that sales of cigarettes to non-Indians are subject to the tax imposed by W.S. 39-6-103.

4. That the court find that respondent is immune from suit for costs.

5. That the court find that Indians are not being discriminated against by enforcement of Wyoming's cigarette tax statutes.

6. For such other and further relief as the court deems just and equitable in this action.

STATE BOARD OF EQUALIZATION

By: /s/ Ron Arnold
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Ron Arnold, do hereby certify that on this 28th day of June, 1982 the foregoing Answer was served by placing true and correct copies in the United States mail, postage prepaid to:

David Marion and
Carol Herman
Wind River Legal Services, Inc.
P.O. Box 247
Ft. Washakie, Wyoming 82514

/s/ Ron Arnold

IN THE MATTER OF THE WYOMING STATE TAX COMMISSION AND STATE BOARD OF EQUALIZATION

vs.

Clyde Stagner d/b/a
West Route Trading Co.
P.O. Box 821, Hwy 26
Riverton, WY 82501

Salt Creek Freightways
P.O. Box 39
Casper, WY 82602

Powers Candy Co., Inc.
P.O. Box 4338
602 S. First Avenue
Pocatello, ID 83201

NOTICE OF SEIZURE AND OPPORTUNITY FOR HEARING

(Filed June 7, 1982)

Notice is hereby given that cigarettes not bearing evidence of tax payment pursuant to W.S. 39-6-103, consigned to West Route Trading Company, shipped by Powers Candy Company, Inc., via Salt Creek Freightways, have been found in this state. W.S. 39-6-106 provides that any package of cigarettes found in this state without stamps, imprints or impressions affixed thereto as provided by W.S. 39-6-101 thru 39-6-110 are contraband goods and may be seized without a warrant by the State Board of Equalization.

Notice is hereby given that a shipment of contraband cigarettes consigned, shipped and found or described above,

are hereby seized as contraband by the State Board of Equalization as provided by W.S. 39-6-106.

You are further notified that any of the above named parties may request a hearing before the State Board of Equalization regarding the matter of the seizure of contraband cigarettes, by written request, which must be addressed to and received by the Board of Equalization at 2200 Carey Avenue, Cheyenne, Wyoming 82002, within fifteen (15) days of the date of service of this Notice. If a request for hearing is timely received, a hearing will be conducted in compliance with the Wyoming Administrative Procedures Act and Chapters XX and XXI of the Rules and Regulations of the Department of Revenue and Taxation, as a contested case before the Board of Equalization.

Further, if any party requests a hearing, he may request a stay of disposition of the proceeds of sale of the property seized hereunder until the hearing and decision thereon, and that the proceeds received by the Board will be held in a trust account pending a decision by the Board following the hearing.

Dated this 1 day of June, 1982.

WYOMING STATE TAX COMMISSION AND
STATE BOARD OF EQUALIZATION

ATTEST:

/s/ R. A. Hakala, Chairman

.....
Secretary

/s/ Rudolph Anselmi, Deputy Chairman

/s/ Doran A. Lummis, Member

STATE OF IDAHO)
COUNTY BANNOCK)

I, ..., an employee of the Bannock County Sheriff's Dept. Pocatello, Idaho, do hereby certify that I received the within Notice of Seizure and that I served the same in the county aforesaid on this 9th day of June, 1982, by delivering a copy of same to Dave Powers, President of Powers Candy.

/s/ James Davis, Deputy Sheriff

I hereby certify that I served the foregoing Notice of Seizure and Opportunity for Hearing on the defendant on the 9th day of June, 1982, by delivering a true and correct copy thereof to: Dave Powers, President.

/s/ James Davis, Deputy Sheriff